Supreme Court, U.S.
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No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BEATRICE ALEXANDER, ETC., ET AL.,
Petitioners,

vs.

ADAM HERBERT, ET AL.,
Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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March 2, 1995

53pp

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

1. Has Anderson v. Creighton, 483 U.S. 635, 640 (1987), which holds that the precise action in question need not have previously been held unlawful in order for a 42 U.S.C. §1983 plaintiff to overcome a defense of qualified immunity, been overruled?

2. Were the constitutional rights and duties alleged in the complaint in this case sufficiently clearly established in 1989 to overcome a defense assertion of qualified immunity?

LIST OF PARTIES

BEATRICE ALEXANDER and DAVID COLEMAN, as Co-Administrators of the Estate of David Charles Coleman,

Petitioners,

vs.

ADAM HERBERT; THOMAS C. HEALY; OTIS HOLLOWAY OWENS;[1] DOUG COVEY; and HERBERT E. CARTER, JR.,[2]

Respondents.

---

[1]Otis Owens has been dismissed as a defendant.

[2]Herbert E. Carter, Jr., was added as a defendant in the Second Amended Complaint filed after the District Court denied the respondents' motion for judgment on the pleadings on grounds of qualified immunity.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Beatrice Alexander and David Coleman, as co-administrators of the estate of David Charles Coleman, respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the

Eleventh Circuit entered in this action on December 2, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, reported at 39 F.3d 290, was previously released as a slip opinion, Alexander, et al. v. University of North Florida, et al., No. 93-3158 (11th Circuit, December 2, 1994), and is reproduced in the Appendix at pages 1a through 7a. The opinion of the United States District Court for the Middle District of Florida is not reported and is reproduced in the Appendix at pages 8a through 20a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1994. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case requires interpretation and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides, "No state shall...deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

The Estate of David Charles Coleman, through its co-administrators, the petitioners, brought this action to recover damages from certain State officials for violations of certain of the decedent's constitutional rights, resulting in a third party fatally shooting Mr. Coleman. The respondents are officials or former officials of a State university, the University of North Florida. The rights of Mr. Coleman alleged to have been violated, resulting in his death, are his substantive due process rights to life and liberty under

the Fourteenth Amendment to the United States Constitution.

Petitioners allege that respondent Adam Herbert violated such rights by failing to train University employees and that all respondents violated such rights by failing to protect Mr. Coleman from known physical danger. The respondents are alleged to have acted or failed to act with deliberate and reckless indifference to Mr. Coleman's Fourteenth Amendment rights, rendering them liable for damages pursuant to 42 U.S.C. §1983. The bases for federal jurisdiction in the first instance are 28 U.S.C. §§1331 and 1343(a)(3); 42 U.S.C. §1983; and the Fourteenth Amendment to the Constitution of the United States.

On December 5, 1989, David Charles Coleman was shot to death by a fellow student, Margaret Haywood, at a University of North Florida classroom. The shooting followed an escalating pattern of harassment

of and violence against Mr. Coleman by Ms. Haywood, which was known to the respondents, who failed to implement promises to protect Mr. Coleman from May Haywood. Respondents further affirmatively had restored Ms. Haywood to student status at the University after she had been suspended on the basis of her threats and violence against Mr. Coleman.

David Charles Coleman entered the University of North Florida as a full time student in 1984. During the 1987-1988 academic year, Mr. Coleman became acquainted with Margaret Haywood, who at the time also was a student at the University of North Florida. In the fall of 1988, Ms. Haywood began harassing Mr. Coleman and his girlfriend, Cheryl Quarles, also a student at the University of North Florida, by following them around campus and by placing hundreds of harassing telephone calls to them, as well as to Ms. Quarles' family.

Ms. Haywood's harassment included numerous threats of physical harm to Mr. Coleman and Ms. Quarles, and the respondents were placed on actual notice of Ms. Haywood's conduct at least by October, 1988. Ms. Haywood's conduct toward Mr. Coleman at the University of North Florida campus rose to the level of physical assault on April 16, 1989, at the University library, and campus police described Ms. Haywood following the incident as "yelling, screaming and rambling" and "out of control"

By the time of the library incident, Mr. Coleman had made several written complaints and requests for protection from Ms. Haywood to the University of North Florida police. Following the library incident, Mr. Coleman again contacted University police, who stated in a written report that Ms. Haywood told the investigating officers that Mr. Coleman and Ms. Quarles "were going to pay," and that

Ms. Haywood was verbally threatening and uncooperative.

Respondent Doug Covey was assigned to handle Mr. Coleman's complaints and ensure that Ms. Haywood would not threaten or harass Mr. Coleman. Mr. Coleman repeatedly requested that the respondents protect him from further physical attacks in the escalating cycle of harassment, threats and violence on the part of Ms. Haywood. Mr. Coleman also sought and obtained a restraining order against Ms. Haywood, and all respondent were placed on notice of the restraining order. Ms. Haywood also was suspended from the University.

On June 9, 1989, the University of North Florida, through respondents Thomas C. Healy and Herbert E. Carter, Jr., entered into a Memorandum of Agreement with Ms. Haywood, providing conditions for Ms. Haywood's readmittance as a student at the University of North Florida following her

suspension from the University. Pursuant to the agreement, Ms. Haywood was required to undergo psychiatric evaluation and to follow up on the evaluation with further appointments as recommended, to pursue the completion of degree requirements and to conform without deviation to the restraining order. The University agreed to remove Ms. Haywood's previously imposed suspension from her file, accept Ms. Haywood's registration, drop a previous requirement for University Police Department escorts of Ms. Haywood, provide make-up exams where applicable from the spring 1989 semester, and conform to the restraining order as it related to all parties.

Ms. Haywood subsequently made no effort to comply with the psychiatric examination and counseling requirements, and the respondents made no effort to enforce compliance with the agreement. However, Ms. Haywood was permitted to return and remain

as a student at the University of North Florida even though the respondents knew or should have known that Ms. Haywood had not undergone psychiatric evaluation and counseling and remained a danger to Mr. Coleman's safety.

On November 17, 1989, November 21, 1989 and November 22, 1989, Mr. Coleman notified University police officers and the respondents or their agents that Ms. Haywood continued to threaten him, harass him and otherwise violate terms of the restraining order and the Memorandum of Agreement she had entered with the University. Respondents failed to respond to Mr. Coleman's complaints and Ms. Haywood's escalating conduct. On November 28, 1989, Cheryl Quarles met with respondent Healy to report continued incidents of Ms. Haywood threatening and harassing her and Mr. Coleman, and Dr. Healy told Ms. Quarles that

he would determine what course of action to follow after talking to Mr. Coleman.

On November 30, 1989, Mr. Coleman and Ms. Quarles met with Dr. Healy, Otis Holloway Owens, Doug Covey and an attorney for the University of North Florida. At that meeting, the respondents were again placed on notice that Ms. Haywood was exhibiting dangerous behavior toward Mr. Coleman and that Mr. Coleman believed that Ms. Haywood was going to hurt him. At the conclusion of that meeting, the individual respondents promised Mr. Coleman that they would undertake steps to ensure his physical safety and protect him against Ms. Haywood's violence; however, no such steps were ever undertaken.

The respondents failed to resume a requirement for police escorts of Ms. Haywood, as they had agreed to do in the event she violated her agreement not to harass Mr. Coleman. At all relevant times,

all respondents had continuous, actual knowledge of the University's contractual agreement with Ms. Haywood, Ms. Haywood's repeated and continued violations of the conditions of the agreement, Ms. Haywood's propensity toward violence and the foreseeability that Ms. Haywood would physically harm Mr. Coleman.

On December 5, 1989, Margaret Haywood approached David Charles Coleman at his regularly scheduled classroom at the University of North Florida and fired a Raven .25 caliber pistol at Mr. Coleman six times, fatally wounding him. At all relevant times prior to Mr. Coleman's killing by Ms. Haywood, all respondents knew or should have known of the demonstrated risk that Ms. Haywood would harm Mr. Coleman.

The respondents failed to protect Mr. Coleman from the known threat of physical harm by violence posed by Margaret Haywood;

failed to monitor Ms. Haywood's activities as agreed upon; failed to abide by the terms of the contractual agreement by which Ms. Haywood remained a student at the University of North Florida; ignored repeated notices by Mr. Coleman and Ms. Quarles of Ms. Haywood's threats of physical harm to Mr. Coleman; failed to carry out specifically promised actions on behalf of Mr. Coleman; and failed to respond when placed on direct notice of the foreseeability that Ms. Haywood would harm Mr. Coleman.

Petitioners initiated this action by alleging violations of State and Federal law in a complaint filed on April 24, 1992, in the Circuit Court of the Fourth Judicial Circuit, Duval County, Florida. The respondents subsequently removed the action to the United States District Court for the Middle District of Florida. The respondents moved for dismissal of the action. The District Court granted respondents' motion

to dismiss as to state law claims and as to the University of North Florida, but denied the motion to dismiss as to 42 U.S.C. §1983 claims against individual defendants.

Respondents moved on June 10, 1993, for judgment on the pleadings on grounds of qualified immunity. On September 1, 1993, the District Court denied the motion for judgment on the pleadings.

In its order denying respondents' motion for judgment on the pleadings, the District Court concluded that the facts as pled may establish the existence of a special relationship between David Charles Coleman and the respondents, and may establish that the respondents exposed Mr. Coleman to a special danger in allowing Ms. Haywood's readmittance into the University despite her failure to comply with the agreement by which she was readmitted to the University, rendering an affirmative duty for the respondents to protect Mr. Coleman.

The District Court held that "it is clearly established that section 1983 liability attaches when state officials fail to protect an individual to whom it [sic] owes an affirmative duty of protection." The District Court based its finding that the pertinent law was clearly established in 1989 on the cases of Wright v. City of Ozark, 715 F.2d 1513, 1515 (11th Cir. 1983); Jones v. Phyfer, 761 F.2d 642, 654 (11th Cir. 1985); Cornelius v. Town of Highland Lake, Alabama, 880 F.2d 348 (11th Cir. 1989); and pre-1989 case law from other circuits.

The Court of Appeals reversed. In its decision, the Court of Appeals relied on its decision in Lassiter v. Alabama A & M University, 28 F.3d 1146 (11th Cir. 1994) (en banc), for the proposition that governmental officials are entitled to qualified immunity unless pre-existing case law "dictates" and "compels" the existence

of the constitutional duties alleged by the petitioners. The Court of Appeals specifically considered only one of numerous cases relied upon by the petitioners, Cornelius v. Town of Highland Lake, Alabama, 880 F.2d 348 (11th Cir. 1989), and concluded that the facts of Cornelius were "too different" from those at issue herein to constitute a basis for overcoming a defense assertion of qualified immunity.

The Court of Appeals did not discuss Anderson v. Creighton, 483 U.S. 635 (1987), which was among the cases upon which petitioners relied. The court concluded that other cases upon which petitioners rely were not "of sufficient similarity" to overcome respondents' claim of qualified immunity.

REASONS WHY THE WRIT SHOULD BE GRANTED

THE COURT OF APPEALS APPLIED A COMPULSION STANDARD IN ANALYZING A QUALIFIED IMMUNITY DEFENSE, IN CONFLICT WITH DECISIONS OF THIS COURT HOLDING THAT A STANDARD OF OBJECTIVE LEGAL REASONABLENESS APPLIES TO CLAIMS OF QUALIFIED IMMUNITY.

The Court of Appeals applied in this case a standard of qualified immunity analysis that conflicts with the standard established by this Court. The Court of Appeals requires a 42 U.S.C. §1983 plaintiff to identify pre-existing law that "dictates" and "compels" a conclusion that actions or omissions by state officials violate an individual's constitutional rights. By so holding, the Court of Appeals effectively requires a §1983 plaintiff to identify a factually identical case pre-dating the conduct at issue, holding such conduct constitutionally unlawful, in order to

withstand a defense assertion of qualified immunity.

The holding below thus conflicts with this Court's well-established standard of "objective legal reasonableness" for determining whether a governmental official's conduct is protected by qualified immunity. The principle most directly contravened by the Court of Appeals was set forth in Anderson v. Creighton, 483 U.S. 635 (1987). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official's action is protected by qualified immunity unless the very action in question has previously been held unlawful...; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id. at 640 (citations omitted) (emphasis added). Qualified immunity provides no protection to "the

plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

The facts as alleged by the petitioners establish that the respondents had, and affirmatively undertook, a constitutional duty under the Fourteenth Amendment Due Process Clause to protect David Charles Coleman from known and foreseeable violent propensities of Margaret Haywood, the violation of which duty resulted in Mr. Coleman's death. The existence of respondents' duties was clearly established by 1983, and certainly by 1989, by decisions of the Eleventh Circuit and other circuits. Respondents' appreciation of such duties is evidenced objectively by the fact that they undertook such duties. Additionally, petitioners' allegations demonstrate that respondents were "plainly incompetent" in constitutional proportions with respect to Mr. Coleman's due process rights, and so are

not entitled to qualified immunity under Malley, supra.

A constitutional duty for a state official to protect an individual from violence by a third party arises where a special relationship exists between the state, or its officials, and either the victim or the wrongdoer, or where state action creates a special danger or renders the victim more vulnerable to such danger. Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982); Humann v. Wilson, 696 F.2d 783 (10th Cir. 1983); Fox v. Custis, 712 F.2d 84 (4th Cir. 1983); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983); Wright v. City of Ozark, 715 F.2d 1513 (11th Cir. 1983); Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984); Jones v. Phyfer, 761 F.2d 642 (11th Cir. 1985); Janan v. Trammell, 785 F.2d 557 (6th Cir. 1986); L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989); Cornelius v. Town

of Highland Lake, Alabama, 880 F.2d 348 (11th Cir. 1989); D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992); Gregory v. City of Rogers, Arkansas, 974 F.2d 1006 (8th Cir. 1992); Ying Jing Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993); Doe v. Taylor Independent School District, 15 F.3d 443 (5th Cir. 1994) (en banc) (applying special relationship/special danger analysis both before and after DeShaney v. Winnebago Department of Social Services, 489 U.S. 189 (1989)). See also, Shapiro, Snake Pits and Unseen Actors: Constitutional Liability for Indirect Harm, 62 U.Cin.L.Rev. 883 (Winter, 1994).

The foregoing authorities demonstrate that, in 1989, the law was clearly established under a variety of factual circumstances that a constitutional duty exists for governmental officials to protect private citizens from known risks of harm

when such officials have entered a special relationship with the citizen or the wrongdoer, or where the victim faced a special danger distinguishable from that of the public at large or a danger created or enhanced by the conduct of such officials.

Despite such authority, the Court of Appeals in effect held the petitioners herein to a standard of having to demonstrate the existence of pre-1989 case law construing as unlawful the very facts presented in this case. The Court of Appeals for the Eleventh Circuit has applied the same standard in other qualified immunity cases. See, e.g., Lassiter v. Alabama A & M University, 28 F.3d 1146 (11th Cir. 1994) (en banc); Belcher v. City of Foley, Alabama, 30 F.3d 1390 (11th Cir. 1994); Jordan v. Doe, 38 F.3d 1559 (11th Cir. 1994); Rodgers v. Horsley, 39 F.3d 308 (11th Cir. 1994); Adams v. St. Lucie County Sheriff's Department, 998 F.2d 923 (11th

Cir. 1993) (en banc majority adopting panel dissent of Edmondson, Jr., 962 F.2d at 1573-1579). In so doing, the Court of Appeals contravenes the holding of Anderson v. Creighton, 483 U.S. 635 (1987), that the very action in question need not have previously been held unlawful in order to withstand a qualified immunity assertion.

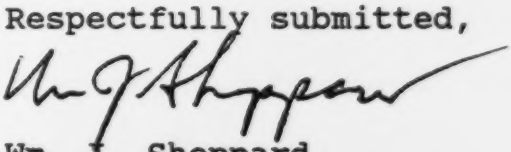
The Court of Appeals further failed to consider sufficiently the numerous other cases decided by the Eleventh Circuit and other Courts of Appeals, see supra, at 19-20, in analyzing this case. See, Elder v. Holloway, 510 U.S. ___, 127 L.Ed.2d 344 (1994) (all relevant precedents should be considered in reviewing a claim of qualified immunity). The District Court in this case appropriately considered authority from the Eleventh Circuit and other circuits in determining that qualified immunity should be denied to the respondents herein.

As a result of the foregoing, the Court of Appeals erroneously holds the petitioners to a standard for withstanding a qualified immunity defense that contravenes the holdings of this Court. No decision by this Court requires a showing that, in effect, the same facts as presented have previously been held constitutionally unlawful to defeat a claim of qualified immunity. The touchstone standard is that of objective legal reasonableness. That the constitutional duties alleged in this case were objectively legally reasonable in 1989 is demonstrated by ample case law of Courts of Appeals and by the fact that the respondents affirmatively undertook such duties with respect to Mr. Coleman and then acted plainly incompetently. Review in this Court is necessary to correct the erroneous expansion of qualified immunity by the court below which, if not corrected, substantially eviscerates 42 U.S.C. §1983.

CONCLUSION

For the reasons given above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A

Opinion of the Eleventh Circuit Court of Appeal, dated December 2, 1994 ..... 1a

APPENDIX B

District Court's Order Denying Defendant's Motion for Summary Judgment, dated September 1, 1993 ..... 8a

BEATRICE ALEXANDER, as
co-administrator of the
estate of David Charles Coleman,
David Coleman, as
co-administrator of the estate
of David Charles Coleman,

Plaintiffs-Appellees,

v.

UNIVERSITY OF NORTH FLORIDA,
et al.,

Defendants,

Adam Herbert, individually and
in his official capacity as
President of the University of
North Florida, Thomas C. Healey,
etc., Otis Halloway Owens, etc.,
Doug Covey, etc., et al.,

Defendants-Appellants.

No. 93-3158

United States Court of Appeals
Eleventh Circuit

Dec. 2, 1994

Before EDMONDSON and BIRCH, Circuit Judges,
and HILL, Senior Circuit Judge.

PER CURIAM:

Principles of qualified immunity control this case. At issue is whether university officials are entitled to qualified immunity against a claim that they violated a student's due process rights to life and liberty by failing to protect the student from the known threats of a fellow student.[1] We conclude the defendant officials are entitled to qualified immunity and reverse the district court.

In 1988, David Coleman was a student at the University of North Florida when he began receiving threatening phone calls from Margaret Haywood, a fellow student. Coleman informed university officials of the harassment, and he requested protection.

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[1] Plaintiffs set out their claim in two separate counts of the complaint: Count IV, a failure to protect claim, and Count III, a claim based on failure to train to avoid the constitutional violation of failure to protect. For purposes of this appeal, we need not distinguish between the two counts.

The harassment increased and in April 1989 Haywood attacked Coleman in the university library. As a result, the university suspended Haywood. The university then allowed her to return in June 1989 provided she not harass Coleman. Haywood did not abide by the agreement, and Coleman informed the university that Haywood continued to threaten him. The university assured Coleman it would take steps to ensure his safety. But, on December 5, 1989, Haywood shot and killed Coleman as he entered a class.

Coleman's parents brought suit against defendants, university officials, claiming that the officials had a duty to protect Coleman from Haywood and that, in failing to protect him, the officials violated Coleman's substantive due process rights to life and liberty under the Fourteenth Amendment to the Constitution. Before

trial, defendants moved for judgment on the pleadings on the ground they were entitled to qualified immunity. The district court denied defendants' motion after concluding that in 1989 it was clearly established that a state may have a duty to protect a person with whom it has a special relationship and that the facts of this case may have given rise to a special relationship between defendants and Coleman.

As we explained in Lassiter v. Alabama A & M University, 28 F.3d 1146 (11th Cir. 1994), qualified immunity for government officials is the rule, liability and trials for liability the exception. A plaintiff suing a government official has the burden of showing that the official's acts, at the time, violated clearly established law. Id. "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or

raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." Id.

To avoid qualified immunity, plaintiffs in this case must point to pre-existing law which "dictates" and "compels" the conclusion that, in 1989, university officials had a duty to protect Coleman from the violent acts of another student. Plaintiffs fail to do so. Plaintiffs rely mainly on the decision in Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989) to satisfy the burden; but, that case involved prison inmates on work detail in a public building who attacked a public employee assigned to work at that building. The facts in Cornelius are too different from the facts of this case to establish clearly the law governing defendants'

conduct.[2]

Cornelius, at most, creates some ambiguity about whether a state may owe a duty of protection to someone outside the traditional custodial relationship. But, nothing in Cornelius comes close to the "clearly established" standard required to overcome the qualified immunity defense in this case. For example, Cornelius (unlike this case) does not involve the peculiarities of a school or university setting. In addition, no case has been called to our attention in which neither the assailant nor the victim was in custody and in which the special duty to protect has been found and applied to support liability.

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[2] The Supreme Court has said that a state can have a duty to protect individuals in its custody. Deshaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). The case before us does not involve a custodial situation.

Plaintiffs advance no case of sufficient similarity to the present case that, in 1989, would have put defendants on notice that what they were doing did violate Coleman's federal rights. That defendants, pursuant to federal law, owed Coleman a duty of protection was not established clearly when defendants acted or failed to act. So, defendants, in their individual capacity, are entitled to qualified immunity. Therefore, we REVERSE the denial of qualified immunity.

REVERSED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

BEATRICE ALEXANDER and DAVID COLEMAN, as Co-Administrators of the Estate of David Charles Coleman,

Plaintiffs,

-vs-

THE FLORIDA STATE BOARD OF REGENTS; ADAM HERBERT, individually and in his capacity as President of the University of North Florida; THOMAS C. HEALY, individually and in his capacity as Interim Vice President of the University of North Florida; OTIS HOLLOWAY OWENS, individually and in his capacity as Dean for Academic Support Services for the University of North Florida; and DOUG COVEY, individually and in his capacity as Dean of Student Life for the University of North Florida,

Defendant.

O R D E R

Plaintiffs, the co-Administrators of the estate of their son David Charles Coleman who was shot to death by a fellow

student on the University of North Florida campus, bring this section 1983 action against Defendants alleging that Defendants acted with deliberate and reckless indifference in depriving Coleman of his Fourteenth Amendment substantive due process right to life and liberty. The case is before the Court on Defendants' motion (Doc. 41) for judgment on the pleadings as to Counts III and IV of the Plaintiffs' amended complaint.[1] Plaintiffs have responded.

Plaintiffs allege in Count III of the amended complaint that Defendant Adam Herbert "with deliberate and reckless indifference" directly caused the alleged constitutional violation by his failure "to train his agents and University employees to protect students from known threats of harm

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[1] Counts I and II of the amended complaint were dismissed by order of the Court on March 3, 1993.

by other students." Amended complaint, Doc. 22, at 13, ¶¶54(f), 57. In Count IV, Plaintiffs allege that Defendants Herbert, Healy, Owens and Covey "failed to protect Mr. Coleman from a known physical danger and [that they] acted with deliberate and reckless indifference to the consequences of permitting Ms. Haywood to remain on the campus as a student at the University." Amended complaint, Doc 22, at 14, ¶61. Defendants argue that because they were acting within the scope of their official duties, and because the acts and omissions complained of do not violate any clearly established constitutional right, they are entitled to a qualified immunity defense.

The qualified immunity shield protects government officials performing discretionary functions from liability for civil damages if their conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known. Hutton v. Strickland, 919 F.2d 1531-36 (11th Cir. 1990) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). The doctrine was established by the Supreme Court to protect "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 344-46, 106 S.Ct. 1092, 1097-98, 89 L.Ed.2d 271 (1986); and the official's conduct is to be measured by the "objective legal reasonableness" of the action taken. Harlow, 457 U.S. at 819, 102 S.Ct. at 2739. See also Anderson v. Creighton, 483 U.S. 635, 638-39, 107 S.Ct. 3034, 3038, 97 L.Ed. 523 (1987).[2]

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[2]Further, it is now the settled law of the Eleventh Circuit that, in most cases, a qualified immunity defense should be decided by the court as a matter of law, not to be submitted to the jury, Stone v. Peacock, 968 F.2d 1163, reh'g denied, 980 F.2d 1449 (11th

In undertaking the decision making process concerning the issue of qualified immunity, the moving defendant must first establish that he or she was acting within the scope of his or her discretionary authority of an official of the state when the allegedly wrongful acts occurred. The burden then shifts back to the plaintiff to show the defendant violated clearly established law in committing those acts. Hutton, 919 F.2d at 1537 (citing Rich v. Dollar, 841 F.2d 1558 (11th Cir. 1988) and Hudgins v. City of Ashburn, 890 F.2d 396 (11th Cir. 1989)).

The first prong of this analysis -- that the Defendants were acting within the scope of their discretionary authority as

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Cir. 1992) and, if a motion for summary judgment based upon an assertion of qualified immunity is denied, the defendant has a right of immediate appeal under the collateral order doctrine. Hutton, 919 F.2d at 1535.

state officials -- is not disputed by the Defendants in this case. The second prong of the required analysis requires an additional two step approach: (a) was the governing law clearly established when the acts occurred; and (b) is there any genuine issue of fact regarding the defendant's having engaged in conduct violative of that clearly established law. Hutton, 919 F.2d at 1538.

Whether governing law was "clearly established" requires an examination of the constitutional basis of the plaintiff's claim as well as other relevant case law.

> The operation of [the objective reasonableness standard] depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that clause (no matter how unclear it may be that the particular action is a violation)

> violates a clearly established right.... It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held lawful...but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. at 639-40, 107 S.Ct. at 3038-39, 3040 (citations omitted).

The Eleventh Circuit has recognized that government officials may be held liable for the deprivation by a third party of a private citizen's due process rights when a special relationship is found to exist between the private citizen and the government. See Wright v. City of Ozark,

715 F.2d 1513, 1515 (11th Cir. 1983). In Wright, a woman was raped in the City of Ozark by an unknown assailant. Id. at 1514. The Eleventh Circuit affirmed the district court's dismissal of the complaint for failure to state a claim, holding that the defendants owned plaintiff no duty under section 1983 to protect her because no special relationship existed between her and the defendants. Id. at 1516. In a similar case, a plaintiff brought a section 1983 action against state officials alleging that their failure to warn her of the furlough release of a prisoner, who had been convicted and imprisoned for breaking into her home six months earlier, deprived her of her constitutional rights when the convict returned to her home and raped her. Jones v. Phyfer, 761 F.2d 642, 654 (11th Cir. 1985). The Eleventh Circuit held that the plaintiff failed to establish a special

relationship between herself and the state officials, noting that "there is no constitutional duty to protect members of the general public from random criminal violence unless a special relationship exists which imposes such a duty." Id. at 646. In Jones, the court went further and acknowledged that a constitutional right to protection may exist when there has been some showing that the victim faced a special danger distinguishable from that of the public at large. Id. at 644-45.[3]

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[3]Other circuits have applied the special relationship/special danger standard in analyzing whether a constitutionally protected right is implicated in a section 1983 action. See, e.g., Janan v. Trammell, 785 F.2d 557, 560 (6th Cir. 1986) (no due process violation where plaintiff failed to show a special danger distinguishable from public at large stemming from parolee's release); Fox v. Custis, 712 F.2d at 84 (4th Cir. 1983) (section 1983 claim dismissed although court recognized that constitutional right and corollary duty may arise out of special custodial or other relationships created or assumed by the state); Humann v. Wilson, 696 F.2d 783, 784

The Eleventh Circuit has more recently held that the duty that arises by virtue of the special relationship, when coupled with some degree of culpable conduct on the defendant's part -- i.e., in the nature of placing the victim in a position of danger -- creates section 1983 liability. Cornelius v. Town of Highland Lake, Ala., 880 F.2d 348 (11th Cir. 1989), cert. denied, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990). In Cornelius, the plaintiff, a clerk at town hall, was abducted at knife point by inmates who were assigned to a community work squad. Id. at 350. She brought a section 1983 action alleging that by allowing the violent offenders to work in the community, town officials acted with gross negligence and deliberate indifference

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(10th Cir. 1983) (per curiam) (state action too remote from crime where no special relationship existed between plaintiff and parolee or parole officials).

in violation of her constitutionally protected liberty interests under the Fourteenth Amendment. The Eleventh Circuit concluded that by employing plaintiff, the town may have entered into a special relationship with her. Id. at 355. This factor coupled with the fact that the defendants "affirmatively created a potentially dangerous situation," id. at 357, led the court to conclude that there was a "genuine issue relevant to the existence of a special relationship between the town officials and the plaintiff implicating her due process rights." Id. at 356.

Based on the foregoing, it is clearly established that section 1983 liability attaches when state officials fail to protect an individual to whom it owes an affirmative duty of protection. The issue in this case, therefore, is whether such an

affirmative duty existed. The facts as pled may establish the existence of a special relationship between Coleman and the Defendants. David Coleman was a full time student at the University of North Florida from the fall of 1984 until he was shot by fellow student Margaret Haywood as he prepared to enter a classroom in December, 1989. In 1988, when Haywood began harassing Coleman, Defendants were allegedly notified on several different occasions by Coleman of Haywood's actions. Plaintiffs also alleged that after a specific incident during which Coleman was attacked in the school library, Defendant Covey was assigned the specific responsibility of ensuring that Haywood would not further harass or threaten Coleman. In addition, the facts as alleged may establish that Defendants exposed Coleman to a "special danger" because they had, after suspending Haywood from the

campus, allowed her re-admittance after she agreed to comply with an agreement that forbade any further harassment of Coleman.

Accordingly, upon due consideration, Defendants' motion (Doc. 41) for judgment on the pleadings is DENIED.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 1st day of September, 1993.

/s/
United States District Judge

Copy to counsel of record